

## Determination on ex-ante prohibition of unfair commercial practices

1. Decree-Law number 57/2008, of 26 March, enacted the legal regime applicable to unfair commercial practices of companies in their dealings with consumers before, during and after a commercial transaction relating to goods or services.

Pursuant to this statutory instrument, **unfair commercial practises are prohibited**.<sup>1</sup>

A commercial practice<sup>2</sup> is deemed to be unfair where «*it is contrary to the requirements of professional diligence or it materially distorts or is likely to materially distort the economic behaviour of the consumer<sup>3</sup> whom it reaches or to whom it is addressed with regard to specific goods or services*»<sup>4</sup>. Also, «*the fair or unfair nature of a commercial practice is assessed from the perspective of the average consumer, or the average member of a group, where the commercial practice is specifically aimed at a particular group of consumers*»<sup>5</sup>.

The notion of unfair commercial practices includes misleading and aggressive commercial practices. As such:

- a) A commercial practice is regarded as misleading if it contains false information, or, even if it is factually correct, if for any reason it deceives or is likely to deceive the consumer, and in either case causes or is likely to cause him to take a transactional decision<sup>6</sup> that he would not have taken otherwise<sup>7</sup>;
- b) A commercial practice is regarded as aggressive if, by harassment, coercion or undue influence<sup>8</sup>, it significantly impairs or is likely to significantly impair the consumer's freedom of choice or conduct with regard to goods or services and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise»<sup>9</sup>.

The enforcement of provisions in this decree-law is incumbent on the Autoridade de Segurança Alimentar e Económica - ASAE - (the Food and Economic Safety Authority) or on the administrative authority with powers in the relevant sphere<sup>10</sup>, meaning the regulatory body of the sector in which the unfair commercial practise occurs.<sup>11</sup>

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<sup>1</sup> Article 4.

<sup>2</sup> Article 3 d): «*business-to-consumer commercial practices, or commercial practices for short*» means any act, omission, course of conduct or communication, including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of goods or services to consumers.

<sup>3</sup> Article 3 e): «*to materially distort the economic behaviour of consumers*» means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.

<sup>4</sup> Article 5, paragraph 1.

<sup>5</sup> Article 5, paragraph 2.

<sup>6</sup> Article 3 l): «*transactional decision*» means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.

<sup>7</sup> Article 7, being listed the elements relatively to which this deception constitutes a misleading commercial practise.

<sup>8</sup> Article 3 j): «*undue influence*» means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.

<sup>9</sup> Article 11.

<sup>10</sup> Article 21, paragraph 5.

<sup>11</sup> Article 19, paragraph 1.

It thus falls on ICP - ANACOM<sup>12</sup> to monitor the enforcement of Decree-Law number 57/2008<sup>13</sup>, within the electronic communications sector.

In this context, this Authority is entitled to determine precautionary measures, namely ex-ante prohibitions of imminent unfair commercial practises, regardless of fault or proof of actual damage (articles 20, paragraph 2, and 19, paragraph 1).

**2.** Resolution of the Council of Ministers number 26/2009, published on 17 March (RCM) determined the termination of terrestrial analogue TV broadcasts (the so-called switch-off) throughout the whole national territory by 26 April 2012.

In compliance with paragraph 2 of the referred RCM, ICP - ANACOM, by determination of 24 June 2010<sup>14</sup>, approved a final decision on the detailed plan for the termination of terrestrial analogue broadcasts in each transmitter and relay - hereinafter referred to as the Switch-Off Plan (SOP).

The SOP provides for the switch-off in three phases, namely:

1<sup>st</sup> Phase - 12 January 2012, for transmitters and relays which substantially provide coverage of the coastal area of the mainland territory;

2<sup>nd</sup> Phase - 22 March 2012, for transmitters and relays which provide coverage of the Autonomous Region of the Azores and Madeira;

3<sup>rd</sup> Phase - 26 April 2012, for remaining transmitters and relays.

In compliance with the SOP, which also provided for the switch-off, in a previous stage to the three phases detailed above, of certain specific relays in pilot zones to be determined at a later date, according to the conditions of eligibility publicised at the time, ICP - ANACOM, on 22 December 2010, approved a final decision on the identification of pilot stage relays and respective switch-off dates<sup>15</sup>.

It was thus determined that the pilot stage switch-off would take place in the following relays and dates:

- Alenquer relay - 12 May 2011;
- Cacém relay – 16 June 2011;
- Nazaré relay – 13 October 2011.

The switch-off process is very sensitive and important for populations, and according to clarifications provided by ICP - ANACOM, users will not be subject to any monthly charges to continue watching TV after the switch-off. This means that the migration to digital terrestrial television does not involve the need to subscribe pay-TV services.

**3.** Aware that the migration process attached to the switch-off implies the adjustment of television reception equipment or infrastructures owned by viewers of analogue free-to-air broadcasts, ICP - ANACOM acknowledges that this period may constitute an opportunity for

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<sup>12</sup> Vide article 3 bb) of Law number 5/2004, of 10 February.

<sup>13</sup> Insofar as the unfair commercial practise is not related to advertising, in which case the competent administrative authority is the Direcção-Geral do Consumidor - Consumer Directorate-General (article 19, paragraph 3).

<sup>14</sup> Available at <http://www.anacom.pt/render.jsp?contentId=1032177>.

<sup>15</sup> Available at <http://www.anacom.pt/render.jsp?contentId=1064033>.

electronic communication companies, namely providers of pay-TV services, to secure new customers.

However, it is not acceptable, in fact it is clearly illegal, for companies or their agents to exploit this business opportunity by adopting commercial practises that distort the economic behaviour of consumers, harming directly their own economic interests and indirectly those of their competitors.

In fact, as the switch-off drew near in the first pilot zone, which in the meantime took place on 12 May, doorstep-selling situations and telephone calls have been brought to public attention, in which, given the inevitable analogue switch-off, the subscription of a paid service has been presented as the only solution to continue watching TV, clearly an unfair commercial practise pursuant to article 5, paragraph 1. This practise constitutes a breach punishable by a penalty between €250 and € 3740.98, where the infringer is a natural person, and between €3000 and 44891.81, where the infringer is a legal person<sup>16</sup>. Additionally, depending on the seriousness of the infraction and on the fault of the infringer, accompanying sanctions may also be applied, such as (1) forfeit of objects belonging to the infringer; (ii) prohibition to pursue a profession or activity whose exercise depends on a public certificate or on an authorization or approval by a public authority; (iii) closure of an establishment subject to an authorization or license by an administrative authority; or (iv) disclosure of penalties and accompanying sanctions applied, at the infringer's expense.<sup>17</sup>

Bearing in mind that the switchover to digital TV is inevitable, according to the phased time and geographic arrangements made available to the public, it is likely that electronic communications companies or their agents adopt these conducts, which must be urgently prevented.

ANACOM thus takes the view that the conditions have been fulfilled for immediately imposing an ex-ante prohibition of unfair commercial practices, as a precautionary measure.

Therefore,

Whereas companies are liable for infringements committed in acts carried out in their name or on their behalf by members of governing, supervisory and managing bodies and by their officials in the exercise of their duties, as well as for infringements committed by agents and representatives in acts carried out in their name or on their behalf;

Whereas failure to comply with this precautionary measure, besides being punishable pursuant to article 21 of Decree-Law number 57/2008, is also an infringement of a legitimate order imposed by ICP - ANACOM, punishable by a penalty between €500 and €3740 and between €5000 and €5000000, according to whether the infringer is a natural or a legal person, respectively<sup>18</sup>;

Pursuant to article 20, paragraph 2 and paragraph 5 a) of Decree-Law number 57/2008, of 26 March, ICP - ANACOM hereby determines:

1. That all commercial practises which lead in any way the consumer to believe that a paid service should be subscribed in order to continue receiving free and unrestricted access television programme services, namely RTP1, RTP2, SIC and TVI, as well as RTP Açores and RTP Madeira in the respective Autonomous Regions, are prohibited.

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<sup>16</sup> Article 21, paragraph 1.

<sup>17</sup> Article 21, paragraph 2.

<sup>18</sup> Article 113, paragraph 1 xxx) and paragraph 2, of Law number 5/2004, of 10 February, as amended by Decree-Law number 176/2007, of 8 May.

2. That the prohibition laid down in the preceding paragraph is addressed to electronic communications companies providing television signal distribution services, as well as to agents advertising or marketing such services.

Lisbon, 19 May 2011.